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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 835

HALTOM CITY STATE BANK OF FORT WORTH,
Petitioner

vs.

SEABOARD SURETY COMPANY AND THE UNITED STATES, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Haltom City State Bank of Fort Worth, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on January 14, 1959.

Opinion of the Court of Claims (R. 67) is reported at .....C. Cls. .....

JURISDICTION

The judgment of the United States Court of Claims was made and entered on January 14, 1959. A copy thereof is appended to this petition in the appendix at page 12. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

On motion of the United States, the petitioner was made a third-party defendant in a suit brought by Seaboard Surety Company against the United States by virtue of Rule 19, Rules of the Court of Claims of the United States. Seaboard Surety Company alleges money due by virtue of its completing a defaulting contractor's contract with the Government, which moneys had been previously paid to the bank by virtue of an assignment from the contractor. The questions presented are:

(1) Whether the Contract Settlement Act of 1944 (41 U.S.C. 114 (b)) gives the United States Court of Claims jurisdiction of parties in the position of this petitioner.

(2) Whether the Court of Claims has jurisdiction of the surety company's suit against the Government.

(3) Whether petitioner is deprived of its constitutional rights to trial by jury upon the Government's cross-claim.

(4) Whether this is a suit between private parties, of which the United States Court of Claims does not have jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent portions of Amendment 7, Constitution of the United States, Contract Settlement Act of 1944 (41 U.S.C. 114 (b) (c)), (41 U.S.C. 101,) Rule 19 (a), *28 U.S.C. 1491*, *Rules of the United States Court of Claims*, are set forth in the appendix at pages 14-18.

STATEMENT

On July 25, 1957, the respondent, Seaboard Surety Company, as plaintiff, filed its petition in the United States Court of Claims (R. 1), alleging that it was surety on a contractor's payment and performance bond given in connection with a Government contract for certain construction at Carswell Air Force Base, Fort Worth, Texas (Pet., paragraphs 4 and 5); contractor executed an assignment of monies due and to become due under the contract to the bank, petitioner (Pet., paragraph 6); that petitioner did not give the surety company notice of the assignment as required by the Assignment Claims Act (Pet., paragraph 7); the United States paid to the petitioner, as assignee, certain progress payments under the contract (Pet., paragraph 8); the surety company, by reason of its paying the claims of laborers and materialmen in the sum of $56,528.52, was entitled to recover from the United States said sum (Pet., paragraphs 9, 10, and 11); the respondents filed an answer and cross-action against the petitioner, Haltom City State Bank of Fort Worth (R. 9), alleging that pursuant to an assignment, the sum of $192,547.66 had been paid to

petitioner, the last payment being made on September 28, 1956 (Cross-claim, paragraph 6); the sum of $12,808.29 had been held as retained percentages under the terms of the contract (Cross-claim, paragraph 6); at the surety's request, petitioner, bank, released its assignment in October, 1956 (Cross-claim, paragraph 8); thereafter, all payments, including retained percentages, were made to the contractor, with the knowledge and without objection by the surety company; no sum remains due on the contract (Cross-claim, paragraph 10); respondent, the United States, prayed that, in the event that respondent, Seaboard Surety Company, recovered from it, the respondent, United States, have judgment for the amount of any such recovery against the bank, petitioner (Cross-claim, Paragraph 12). Upon motion of the United States, without notice to this petitioner, summons was issued to the petitioner, bank. Petitioner timely filed its motion to dismiss the cross-claim of the United States against petitioner on the ground that the United States Court of Claims lacked jurisdiction (R. 15). The Court of Claims, on January 14, 1959, denied this petitioner's motion to dismiss (R. 67).

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Claims should be reviewed because the Court assumes jurisdiction of a class of claim upon which the United States has not given its consent to be sued. The Court, by disregarding the express intent of Congress, erroneously interprets the Contract Settlement Act of

1944 (41 U.S.C. 114 (b)), so as to extend the Court of Claims' jurisdiction over third parties in all classes of litigation where one party has first sued the United States. In so doing, the Court has placed a serious retardent or burden on financial institutions which are now and will in the future finance Government contractors. The Court should use its inherent power of supervision to correct the opinion below. By the Court of Claims retaining jurisdiction, it has opened its doors to a multitude of suits which in reality involve claims between private litigants, the United States having no liability or interest therein. The opinion of the Court of Claims should be reviewed because the petitioner and others in a similar situation will have to defend claims brought by the United States in the Court of Claims where their right to a trial of the fact issues by a jury will be denied.

1.

The statutory objects of the Contract Settlement Act (41 U.S.C. 101, et sec.) are declared by Congress in the Act itself to apply only to claims arising under terminated war contracts (41 U.S.C. 101) (Appendix, page 15). The purpose of the Act was to provide a speedy means for the settlement of all claims, to be paid by the Government, to contractors damaged by the termination of war contracts by the Government at the end of World War II. 41 U.S.C. 114 (c) (Appendix page 17), provides:

> "(c) The jurisdiction of the Court of Claims shall not be affected by this chapter except to the extent necessary to give effect to this chapter,

and no person shall recover judgment on any claim, or on any interest in any claim, in said court which said person would not have had a right to assert in said court if this section had not been enacted."

However, in *Maryland Casualty Company vs. The United States*, 135 Court of Claims 428, 141 F. Supp. 900, the United States Court of Claims held that 41 U.S.C. 114(b) gave the Court jurisdiction over third parties asserting a claim to monies still in the hands of the Government in a suit brought by the surety company who had completed a contract for a Government contractor. In this case, the Court of Claims has extended the Maryland Casualty Company case to include jurisdiction over a third party in a suit brought by a surety company against the United States when no funds remain in the hands of the Government. There is an important distinction between cases arising in the settlement of war contract termination claims and even such cases as the Maryland Casualty Company case on one hand and cases such as the instant case. In the first instance, the Government seeks to discharge its obligation, and in the latter, it has already discharged its obligations.

The question of whether the Contract Settlement Act of 1944 applies to all classes of claims against the Government so as to allow the Government to cross-action against third parties not originally a party to the suit, or whether the Act is limited to claims arising under the termnation of war contracts, has not been decided by this Court. Of Course, the United States Court of Claims cannot extend its jurisdiction

by its own rule. *United States vs. Sherwood*, 61 S. Ct. 767, 312 U.S. 584, 85 L. Ed. 1058. The settlement of this question is of importance to the Government and to all who contract with the Government or contract with those having contracts with the Government.

2.

The United States Court of Claims, by the decision sought to be reviewed, has assumed jurisdiction of a claim upon which the United States has not given its consent to be sued. The surety company does not allege an assignment from the defaulting contractor nor that funds due under the contract remain in the hands of the Government, nor does it allege any facts showing a cause of action coming within 28 U.S.C. 1491 (Appendix, page 18). The Court, by accepting jurisdiction of the surety company's claim, has, by its own decision, extended its jurisdiction. The opinion of the Court of Claims did not expressly hold that there was jurisdiction over the surety company's claim, but stated that it was no concern of the petitioner. For the Court of Claims to have jurisdiction over third parties, it must, manifestly, have jurisdiction over the original claim. This exact question has not been decided by this Court. Only when there are funds in the hands of the Government has this Court recognized jurisdiction of the surety company's claim. These cases recognize an equitable right in the surety company to the monies due the contractor from the Government to the extent that the surety has discharged the contractor's obligation. In this case, the surety company does not allege that it is entitled to

any monies in the hands of the Government, but seeks to recover damages from the United States for monies previously paid to petitioner. Thus, the decision of the Court of Claims has opened its doors to the filing of a multitude of suits seeking to recover from the United States on claims on which the United States has not given its consent to be sued.

3.

The decision of the Court of Claims should be reviewed because such decision, by holding that the Court has jurisdiction over petitioner, deprives petitioner of its right to a trial by jury as given by Amendment 7 of the Constitution of the United States. The decision contravenes the historic rights of all who may be sued by the Government to have fact issues determined by a jury. The holding of the Court is an unreasonable extension of *McElreath vs. United States*, 102 U.S. 426, 26 L. Ed. 189, and is in conflict with the reasoning of this Court in *Ex Parte Skinner vs. Eddy Corporation*, 265 U.S. 86-96, 44 S. Ct. 446, 68 L. Ed. 912.

The *McElreath* case held that when a party voluntarily filed a claim against the United States in the Court of Claims, he thereby waived his right to a jury trial on any set off or allowance the Government might file against him. The petitioner has not waived such right. *Ex Parte Skinner vs. Eddy Corporation*, supra, held that mandamus would not lie to the Court of Claims to have a claim against the United States, which the claimant has voluntarily dismissed, rein-

stated so that the United States could file a cross-claim against the claimant. The reasoning of the opinion was that the claimant was deprived of his right to a jury trial.

4.

The Court of Claims, by retaining jurisdiction, has consented to determine a suit between private litigants. The Court held in *McKnight vs. United States*, 98 U.S. 179, 25 L. Ed. 115, that once the Government has paid the funds due under the contract, the Government is discharged, irrespective of the claim of rival claimants. The Government is not concerned to regulate equities of claimants growing out of irregular assignments when collection is complete and liability on the part of the Government is ended. The payment of money pursuant to an assignment discharges the Government's indebtedness as effectively as if payment had been made directly to the principal. The Government, therefore, had no intrest in the outcome and no liability to be litigated. That the Court of Claims does not have jurisdiction to determine the rights between others than the United States is demonstrated by the holding of this Court in *United States vs. Sherwood*, 61 S. Ct. 767, 312 U.S. 584, 85 L. Ed. 1058. That case involved the question of whether or not a judgment creditor could maintain a suit against the United States for breach of contract of the judgment debtor. The Court held, that as relief was sought against others than the United States, the action was beyond jurisdiction of the Court. The consent of the United States to be sued has been the con-

dition on the restriction of issues to be adjudicated between those of the claimant and the Government. There is more reason to refuse jurisdiction in this case than in the Sherwood case. There the Government did owe a judgment; here, the liability of the Government has been discharged.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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I, Leo Brewster, one of the attorneys for Haltom City State Bank of Fort Worth, petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of April, 1959, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Respondent United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C.

2. On the Respondent United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to George Cochran Doub, Esq., Assistant Attorney General, United States Department of Justice, Washington 25, D.C., attention Miss Kathryn R. Baldwin, Attorney, Civil Division.

3. On the Respondent Seaboard Surety Company, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Mr. Jack Hart, Engleman and Hart, 10 East 48th Street, New York 16, N.Y.

Leo Brewster

LEO BREWSTER

APPENDIX

A

OPINION

IN THE UNITED STATES COURT OF CLAIMS

No. 343-57

(Decided January 14, 1959)

SEABOARD SURETY COMPANY

v.

THE UNITED STATES AND HALTOM CITY STATE BANK OF FORT WORTH, THIRD-PARTY DEFENDANT

Mr. William C. Pannell for the third-party defendant. *Mr. Leo Brewster* and *Messrs. Brewster, Pannell, Leeton & Dean* were on the briefs.

Miss Kathryn H. Baldwin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON THIRD-PARTY DEFENDANT'S MOTION TO DISMISS DEFENDANT'S CROSS-CLAIM

Madden, *Judge*, delivered the opinion of the court:

The plaintiff became surety on the performance and payment bonds of a contractor which had a contract to construct a building for the United States. The contractor made an assignment to the third-party defendant, a bank, of the moneys due or to become due to it under the contract. The defendant, the United

States, paid the money which the contractor earned to the third-party defendant. The plaintiff sues the defendant on the ground that, in the circumstances, the defendant should have paid the money to it, and is still obligated to it.

The defendant has filed an answer denying liability to the plaintiff. It has also filed a cross-claim against the third-party defendant, asserting that if it should be decided that any of the money paid to the third-party defendant should have been paid to the plaintiff, and a judgment should be rendered in favor of the plaintiff against the defendant for such money, the defendant should have a judgment in an equal amount against the third-party defendant, on the ground that the money had been paid to it under a mistake of fact and law.

The third-party defendant has filed a motion to dismiss the defendant's cross claim. This opinion is concerned only with that motion. In support of its motion, the third-party defendant asserts that this court does not have jurisdiction of the plaintiff's suit against the defendant. That is really no concern of the third-party defendant. If it should develop that, for want of jurisdiction, the court dismisses the plaintiff's petition, there will of course be no occasion for the defendant to press its cross claim against the third-party defendant.

The third-party defendant also urges, on grounds of statutory construction and constitutional law, that the court has no jurisdiction of the purported cross claim against it. The court has dealt with that question in

the case of *Maryland Casualty Company v. United States*, 135 C. Cls. 428. We adhere to the views expressed in that opinion.

The third-party defendant's motion is denied.

It is so ordered.

Reed, *Justice (Ret.)*, sitting by designation; Whitaker, *Judge*, and Jones, *Chief Judge*, concur.

Laramore, *Judge*, dissents for the reasons given in his dissenting opinion in *Maryland Casualty Company vs. United States*, 135 C. Cls. 428.

B

AMENDMENT 7, CONSTITUTION OF THE UNITED STATES

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the Common law."

C

41 U.S.C. 101

"(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

"(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

"(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

"(d) to facilitate the efficient use of materials manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

"(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

"(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud."

D

41 U.S.C. 114 (b) and (c)

Statute Involved

41 U.S.C. 114(b) and (c) provide:

"The Court of Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suits or proceedings, within such period of time prior to judgment as the Court of Claims shall prescribe. If the name and address of any such person is known or can be ascertained by reasonable diligence, and if he resides within the jurisdiction of the United States, he shall be summoned to appear by personal service; but if any such person resides outside of the jurisdiction of the United States, or is unknown, or if for any other good and sufficient reason appearing to the court personal service cannot be had, he may be summoned by publication, under such rules as the court may adopt, together with a copy of the summons mailed by registered mail to such person's last known address. The Court of Claims may, upon motion of the Attorney General, in any suit or proceeding where there may be any number of persons having possible interests therein, notify such persons to appear to assert and defend such interests. Upon failure so to appear, any and all claims or interests in claims of any such person against the United States, in respect of the subject matter of such suit or proceeding, shall forever be barred and the court shall have jurisdiction to enter judgment pro confesso upon any claim or contingent claim as-

serted on behalf of the United States against any person who, having been duly served with summons, fails to respond thereto, to the same extent and with like effect as if such person had appeared and had admitted the truth of all allegations made on behalf of the United States. Upon appearance by any person pursuant to any such summons or notice, the case as to such person shall, for all purposes, be treated as if an independent proceeding had been instituted by such person pursuant to section 250 of Title 28, and as if such independent proceeding had then been consolidated, for purposes of trial and determination, with the case in respect of which the summons or notice was issued, except that the United States shall not be heard upon any counterclaims, claims for damages or other demands whatsoever against such person, other than claims and contingent claims for the recovery of money hereafter paid by the United States in respect of the transaction or matter which constitutes the subject matter of such case, unless and until such person shall assert therein a claim, or an interest in a claim, against the United States, and the Court of Claims shall have jurisdiction to adjudicate, as between any and all adverse claimants, their respective several interests in any matter in suit and to award several judgments in accordance therewith.

"(c) The jurisdiction of the Court of Claims shall not be affected by this chapter except to the extent necessary to give effect to this chapter, and no person shall recover judgment on any claim, or on any interest in any claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted."

E

RULE 19 (a), RULES OF UNITED STATES COURT OF CLAIMS

"(a) When Third Parties May Be Brought In. The Court on its own motion or on the motion of either party may (1) notify any and all persons with legal capacity to sue and be sued and who appear to have an interest in the subject matter of any pending suit to appear as a party of parties and assert their interest thereon; or (2) on motion of the Attorney General may summon any such third person or persons against whom the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of the suit to appear as a party or parties and defend their interest, if any, in such suit. Such motion, if made by plaintiff, shall be filed at the time the petition is filed. If made by the United States, it shall be filed on or before the date on which it is required to answer."

F

28 U.S.C. 1491

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

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HALTOM CITY STATE BANK OF FORT WORTH,
PETITIONER

v.

SEABOARD SURETY COMPANY AND THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the Court of Claims denying the petitioner's motion to dismiss (R. 67) is not yet reported.

JURISDICTION

The order of the Court of Claims was entered on January 14, 1959. The petition for a writ of certiorari was filed on April 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether this Court should review an interim order of the Court of Claims which denied motions by a

third-party defendant to dismiss the petition filed against the United States and the cross-claim filed by the United States against it.

STATUTE INVOLVED

28 U.S.C. 1255 provides in pertinent part:

> § 1255. *Court of Claims; certiorari; certified questions.*
>
> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant;
>
> * * * * *

Section 14(b) of the Contract Settlement Act of 1944, 58 Stat. 663, 41 U.S.C. 114(b), provides in pertinent part:

> (b) The Court of Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suits or proceedings, within such period of time prior to judgment as the Court of Claims shall prescribe. * * *

STATEMENT

Respondent Seaboard Surety Company is the surety on a performance and payment bond of a contractor who had contracted to construct a building for the United States (R. 2, 5). The contractor assigned to the petitioner, a bank, monies which were due or to become due to it under the contract (R. 2, 6, 8).

Pursuant to this assignment the United States paid to petitioner the sums earned by the contractor (R. 3, 6, 8). The surety then brought this action against the United States in the Court of Claims to recover amounts which it allegedly had paid in satisfaction of claims of laborers and materialmen arising out of the performance by the contractor. The complaint asserted that the assignment between petitioner and the contractor was ineffective as to the surety because of a failure to comply with the notice provisions of the Assignment of Claims Act of 1940, 54 Stat. 1029, as amended, 31 U.S.C. 203.

The United States denied liability to the surety, contesting the surety's claim that the assignment was ineffective as against it (R. 6). The United States also filed a cross-claim against the petitioner under the authority of Section 14(b) of the Contract Settlement Act of 1944, 58 Stat. 663, 41 U.S.C. 114(b) (R. 9). The cross-claim asserted that, if the court should decide that any of the money paid to the petitioner should have been paid to the surety, and if the court should enter a judgment in favor of the surety for such money, the United States would be entitled to a judgment in an equal amount against petitioner on the ground that the money had been paid to it under a mistake of fact and law (R. 13).

The petitioner moved to dismiss the surety's petition in the Court of Claims on the ground that, as it did not assert any claim to money then in the hands of the United States, it did not come within the jurisdiction of the Court of Claims (R. 25, 43–49). Petitioner also moved to dismiss the cross-claim, asserting

that the Court of Claims has neither statutory nor constitutional authority to entertain a cross-claim (R. 15, 49–64).

The Court of Claims denied petitioner's motions. It ruled (1) that the jurisdiction of the Court of Claims over the surety's petition against the United States could not be attacked by petitioner, and (2) that the Court of Claims has statutory authority to entertain a cross-claim in this suit and such authority is constitutional (R. 67–68).

ARGUMENT

The petition for certiorari should be denied. The order which petitioner seeks to have reviewed by this Court simply denied pre-trial motions to dismiss both the surety's petition against the United States and the cross-claim filed by the Government against petitioner. No final judgment has been entered. The case will presumably be set for trial on the merits before the commissioner in the near future.

With the case in this posture we are confident that the Court would not wish to review the interim order of the Court of Claims if it had jurisdiction to do so. No special reasons are advanced why this Court should take the case away from the Court of Claims at this juncture, assuming that power to do so existed. After the Court of Claims has taken final action in the matter, whatever questions the petitioner wishes this Court now to review may be academic and no longer justiciable. No legal rights of petitioner will

[1] The case has been referred by the Court of Claims to a commissioner before whom the matter is now pending on its merits.

be prejudiced by allowing the case in the Court of Claims to proceed to judgment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959